FEDERAL REGULATION OF QUARANTINE

DURING the recent excitement in the South caused by the sudden appearance of yellow fever and the consequent recrudescence of the shotgun quarantine an event has happened that might well attract the attention of every thoughtful citizen of the United States: the surrender of a very essential part of the police power of the State of Louisiana to the Public Health and Marine Hospital Service of the Federal Government, made on the plea of absolute necessity and on the principle that self-preservation is nature's first law. The Governor of the State assumed full responsibility for this surrender, and he had, and has, in this respect, the unanimous support of the leading men of his State, notably that of the well-known and deservedly popular Senator S. D. McEnery, of New Orleans. The Federal Government has thus far conservatively, successfully, and to the general satisfaction of the people of Louisiana, substantially exercised the same powers that it exercised with such universal approbation in Havana when it endeavored to eliminate the yellow fever from that city under the sovereign and unrestricted power then held by the United States in Cuba in all matters of civil and military jurisdiction. The action of the Governor of Louisiana has found, directly and indirectly, vigorous endorsement beyond the limits of the South, and one northern Congressman, Mr. Frederick Landis, of Indiana, claiming that nothing could be more purely national than a quarantine law, has recently declared that he wanted to do "whatever is necessary to get rid of mosquitoes and the constitutional lawyers."[1]

It is universally conceded that quarantine law, that is, laws preventing intercourse, for a certain space of time, on the part of persons infected or under suspicion of infection, with others in order to prevent the spread of some contagious or infectious disease, come under that part of the police power which concerns the preservation of the public health. It has been established, by a long series of decisions, that the police power belongs to the powers not delegated to the United States by the Constitution nor prohibited by it to the States; and is hence reserved to the states respectively, or to the people.

In determining whether a given governmental power rests with the Federal Government or with the States we must start with the presumption that it rests with the States unless such power has been surrendered by the Constitution to the United States, either ex-

[1] The *Times-Democrat*, of New Orleans, November 6, 1905.

pressly or by implication, and that the States possess and exercise, except as so restrained, the authority of independent and sovereign states, having exclusive jurisdiction over persons and things within their territory.[2]

It is admitted that the police power is not expressly surrendered by the States, and an examination of the authorities goes to show that there is no adjudicated case holding that this power is delegated to the Federal Government by implication.

The rule for determining the existence of an implied power is given in the Constitution which declares that the Congress shall have power to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.[3]

How this rule is to be interpreted and applied CHIEF JUSTICE MARSHALL has laid down in a case that has probably never been excelled for felicitous and sound reasoning. After showing the true meaning of "necessary" and "proper" as used in this part of the Constitution, he sums up the whole argument as to the implied powers in a single and ever memorable sentence: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."[4]

Following out the reasoning in this case, five years later, the Supreme Court of the United States, referring to inspection laws, quarantine laws, and health laws of every description, as well as to laws for regulating the internal commerce of a state, declared expressly that "no direct general power over these subjects is granted to Congress and consequently they remain subject to state legislation."[5] This passage has been quoted with approval in several later decisions.[6] It should be noted in this connection that if Congress, in the fair and legitimate exercise of an undoubted express or implied power granted to it by the Constitution, were to pass laws indirectly affecting or controlling state quarantine laws, for instance, such power exercised within those limits would undoubtedly be held as coming within the scope of constitutional authority.

[2] Ohio Life Insurance Co. *v.* Debolt, 16 How. 416, at 428; Pennoyer *v.* Neff, 95 U. S. 714, at 722.

[3] U. S. Constitution, Art. I, Section 8, par. 18.

[4] McCulloch *v.* Maryland, 4 Wheat. 316, 421.

[5] Gibbons *v.* Ogden, 9 Wheat. 1, 203.

[6] City of New York *v.* Miln, 11 Pet. 102, 133; Gilman *v.* Philadelphia, 3 Wall. 713, 726; Slaughter House Cases, 16 Wall. 36, 63.

In *City of New York* v. *Miln*[7] the court refers to quarantine and health laws as part of the police power, and states that this power unquestionably remains and ought to remain with the state. A statute of the State of New York required of every master of a vessel arriving from a foreign port in that of New York City to report the names of all his passengers, with certain particulars of their age, occupation, last place of settlement, and place of their birth; and the statute was held not to be an invasion of the exclusive right of Congress to regulate foreign commerce, but a legitimate exercise of the police power properly within the control of the State. Giving an illustration how far the police power of a state may properly go, MR. JUSTICE SWAYNE stated that under such quarantine laws a vessel registered, or enrolled and licensed, may be stopped before entering her port of destination, or be afterwards removed or detained elsewhere, for an indefinite period, and that a bale of goods upon which duties have or have not been paid, laden with infection, may be seized under "health laws," and, if it could not be purged of its poison, might be committed to the flames. "The inconsistency between the powers of the state and nation as thus exhibited," he added, "is quite as great as in the case before us, but it does not necessarily involve collision or any other evil. None has hitherto been found to ensue. The public good is the end and aim of both."[8] Equally plain a statement is found in *Fertilizing Company* v. *Hyde Park*: "That power [the police power] belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now."[9]

In so far as quarantine laws are the legitimate exercise of the police power of the different states as applied to local conditions, legislation along this line rests exclusively with the states, and the Federal Government, in the absence of any power delegated to it expressly or by implication, cannot in any way make laws directly dealing with these conditions or superseding to any degree this power originally vested in the states by reason of their independent sovereignty.

It has been asked by not a few of the leading men of the South: If the police power, so far as it affects quarantine and health laws, has not been surrendered to the Federal Government at the time of its formation, has it not a right to take charge of the quarantine service if asked to do so by the state legislatures? And should it not accept this charge if tendered? All that can be said in reply to this view is that the state legislatures cannot surrender this power if they

[7] 11 Pet. 102, 142.

[8] Gilman *v.* Philadelphia, 3 Wall. 713, 730.

[9] Fertilizing Company *v.* Hyde Park, 97 U. S. 659, 667.

would, and that the Federal Government, however much it might feel inclined to do so, cannot accept such surrender. It is just as little possible for the states to do this as it is possible for them to enlarge the maritime jurisdiction of the United States.[10] The only legitimate method of accomplishing such a result would be an amendment to the Constitution made in accordance with the provisions of that instrument.

It has also been argued that the Federal Government might pass quarantine laws controlling the police powers of the different states in that respect by the exercise of the power vested in it under what is loosely called "the general welfare clause,"[11] but the most superficial view goes to show that this clause has reference only to the exercise of the taxing power for the purpose of paying the debts, providing for the common defense, and promoting the general welfare of the United States within the scope and limit of the taxing power, at most within the scope and limit of the Constitution itself.

It has also been said that quarantine laws are in effect inspection laws, and that Congress was specially granted the power to revise and control all state inspection laws.[12] The premises on which this reasoning is based are not sound. Inspection laws have exclusive reference to personal property, and quarantine laws are not in effect inspection laws. This contention has been effectively disposed of by a number of decisions.[13]

It must be admitted that, in the absence of an amendment to the Constitution, Congress has no power to deal directly with what is properly intrastate and strictly local quarantine, and, for many reasons, it is well that such is the case.

Has not Congress, it is asked, exclusive control over quarantine in so far as it affects and necessarily controls and regulates trade with foreign countries and commerce among the states? If it has, would not the legitimate exercise of such power be constitutional, even though state quarantine laws should be affected by the natural but indirect consequences of Congressional legislation within the scope of the commerce clause of the Constitution?

In order to answer this question we must look to the commerce clause of the Constitution and to the interpretation as given to it by the ultimate judicial authority on all questions of interstate commerce, the Supreme Court of the United States. The decisions

[10] The Steamboat Orleans *v.* Phoebus, 11 Pet. 175, 183. See also Roach *v.* Chapman, 22 How. 129, 132.

[11] U. S. Constitution, Art. I, Sec. 8.

[12] U. S. Constitution, Art. I, Sec. 10, cl. 2.

[13] People *v.* Compagnie Générale Transatlantique, 107 U. S. 59, 61; Turner *v.* Maryland, 107 U. S. 38, 51-55, giving a list of inspection laws passed by the different States; Gibbons *v.* Ogden. 9 Wheat. 1, 119, 203.

under this head have been far from uniform, and it is admittedly impossible to reconcile them either in their reasoning or in their results.[14] The line of separation between the powers of the states and the power of Congress over interstate commerce is not by any means clear and distinct, and the Supreme Court itself has declined to fix what it has called an arbitrary line of demarcation. "It is far better," said the Court on one occasion, "to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved."[15].

As a matter of fact, the power of Congress over interstate commerce was for a long time held not to be exclusive. It was, however, admitted at all times to be a power far-reaching and incalculable in its possible effects, even before the adoption of the Constitution, as was shown by the modifications of the commerce clause proposed by Massachusetts, New York, Virginia, and North Carolina.[16] As to the exclusiveness of the power of Congress to regulate interstate commerce there was difference of opinion that for a long time fairly paralyzed the action of the Supreme Court. Referring to the decision in *New York* v. *Miln,*[17] in which JUSTICE STORY had given the only dissenting opinion, JUSTICE SWAYNE said: "In the discussion of the case, however, by the judges, the nature and exclusiveness of the power in Congress to regulate commerce was much considered. There was a divided mind among us about it. Four of the court being of the opinion that, according to the Constitution and the decisions of this court in *Gibbons* v. *Ogden* and in *Brown* v. *Maryland,* the power in Congress to regulate commerce was exclusive. Three of them thought otherwise. And to this state of the court is owing the disclaimer in the opinion, already mentioned by me, that this exclusiveness of the power to regulate commerce was not in the case a point for examination."[18]

Ten years after the decision in *New York* v. *Miln* this question came up again in the *License Cases,*[19] and the decision was unanimously in favor of the concurrent power of the states to regulate interstate commerce in all matters with which Congress had not dealt by way of national legislation. In this case state quarantine laws were admitted to be *regulations* of foreign com-

[14] Covington, etc. Bridge Co. *v.* Kentucky, 154 U. S. 204; *in re* Rahrer, 140 U. S. 545, 562; Leloup *v.* Mobile, 127 U. S. 640, 648; Fargo *v.* Michigan, 121 U. S. 230, 240.

[15] Hall *v.* DeCuir, 95 U. S. 485, 488; quoted with approval in Wabash, etc. R. Co. *v.* Illinois, 118 U. S. 557, 571.

[16] See U. S. *v.* Brigantine William, 2 Hall's *Am. Law Journal,* 255.

[17] 11 Pet. 102, 152.

[18] The Passenger Cases, 7 How. 430 and 431. Compare Chief Justice TANEY's statement, *ibid.* pp. 487-490.

[19] 5 How. 504.

merce, so far as they dealt with such commerce in the ports and harbors of the state; but such regulation of foreign and interstate commerce by way of quarantine laws was justified under the concurrent power of the states. Referring to these state laws, CHIEF JUSTICE TANEY said: "Yet all of these health and quarantine laws are necessarily, in some degree, regulations of foreign commerce in the ports and harbors of the state. They subject the ship, and cargo, and crew to the inspection of a health officer appointed by the state; they prevent the crew and cargo from landing until the inspection is made, and destroy the cargo if deemed dangerous to health. And during all this time the vessel is detained at the place selected for the quarantine ground by the state authority. The expenses of these precautionary measures are absolutely, and I believe universally, charged upon the master, the owner, or the ship, and the amount regulated by the state law, and not by Congress. Now, so far as these laws interfere with shipping, navigation, or foreign commerce, or impose burdens upon either of them, they are unquestionably regulations of commerce."[20].

The *License Cases,* however, do not represent the law of to-day. It has since been held that the power over interstate commerce is exclusively vested in Congress; that the power of the states is not in any proper sense concurrent; that where the subject on which Congress can act under its commercial power is strictly local in its nature and sphere of operation—such as harbor pilotage, the improvement of ports, the establishment of beacons and buoys, the erection of wharves, piers, bridges, etc.—and can properly be regulated only by special provisions adapted to the localities in question, the state can act until Congress interferes; but that where the subject is *national* in its character and *admits and requires* uniformity of regulation, affecting alike all the states, such as the transportation of passengers and goods between the states, for instance, Congress alone can act upon it and provide the needed regulation. The absence of any law of Congress on a subject of this nature is equivalent to its declaration that commerce in this matter shall be left free and untrammeled.[21] In the absence of Congressional legislation it is left to the courts to determine when state action does, or does not, amount to a regulation of interstate commerce within the above rule

[20] 5 How. 504, 581.

[21] Leisy *v.* Hardin, 135 U. S. 100; quoting County of Mobile *v.* Kimball, 102 U. S. 691; Brown *v.* Houston, 114 U. S. 622; Wabash, St. Louis, etc. Ry. *v.* Illinois, 118 U. S. 557; Robbins *v.* Shelby Taxing District, 120 U. S. 489; Bowman *v.* Chicago, etc. Ry. Co., 125 U. S. 465. The License Cases, so far as they rested on the view that the law of a state regulating interstate commerce could be valid because Congress had made no regulation on the subject in question, were declared distinctly overthrown. Ibid. p. 118.

and "when that is determined controversy is at an end."[22] This, it seems, is a fair statement of the law as it stands to-day.

If quarantine against foreign nations and between the states themselves involves, of necessity, a regulation *pro tanto* of commerce between them—and who can seriously doubt it—and if quarantine against such dread diseases as yellow fever, cholera, and the bubonic plague is essentially a national measure for the protection of the whole country and not merely a local matter of no concern to the people except those residing in the infected port or state, it would follow, in the present state of the law, and altogether apart from the difficulties inherent in separate and unconnected state action, that the states cannot safely legislate in this matter; and that if there is to be any satisfactory regulation of interstate commerce with a view to meeting the inevitable dislocation of trade in a time of general panic incident to the sudden appearance of infectious diseases of this nature, Congress is bound to deal with this aspect of the question, not merely because the states cannot effectively do it, but because such regulation is an imperative necessity for the entire nation, North and South, and in the interest not only of interstate commerce itself but also, incidentally, of the national health.

That quarantine regulations of this nature are in effect regulations of commerce and, so far, national in their nature seems difficult to deny. CHIEF JUSTICE TANEY'S statement in the *Passenger Cases* seems pertinent to this aspect of the case. "Living as we do," he said, "under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote states or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals, and public offices in every state of the Union. * * * For all the great purposes for which the Federal Government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption as freely as in our own states."[23] In *Crandall* v. *Nevada* [24] there was question only of a small capitation tax of one dollar upon every person leaving the state by railroad, stage coach or other vehicle, payable not directly by the traveler, but by the persons engaged in the business of transportation involving no appreciable loss of time to the passengers in question as the tax

[22] A summary of 24 cases decided in the United States Supreme Court, illustrating this point in the opinion of Chief Justice FULLER, speaking for the Court, is given in Leisy *v.* Hardin, 135 U. S. 100, 119 *et seq.*

[23] The Passenger Cases, 7 How. 283, 492.

[24] 6 Wall. 35, 48.

was evidently paid with the fare. Contrast this with the delay of the quarantine and detention camps and the heavy losses connected therewith, entirely apart from the interference with the commerce between the states themselves. It was well said in *Morgan's Steamship Co.* v. *Louisiana Board of Health*[25] that "quarantine laws belong to that class of state legislation which, whether passed with the intent to regulate commerce or not, must be admitted to have that effect," and it was also conceded, in the same case, [26] that "whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found most convenient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent." In *Missouri, etc., Ry. Co.* v. *Haber*[27] it was maintained that a state statute, although enacted in pursuance of a power not surrendered to the general government, must in the execution of its provisions yield, in case of conflict, to a statute constitutionally enacted under authority conferred upon congress; and this without regard to the source of the power whence the state legislature derived its enactment. It must be admitted that when two such laws come into conflict they do not affect each other "like equal opposing powers," simply because the Constitution is not only itself supreme, but has provided also for the supremacy of all laws made in pursuance of it. In other words, state laws dealing with quarantine and inconsistent with Congressional action regulating foreign and interstate commerce along quarantine lines with a view to protecting the national commerce and also the national health, would be superseded by reason of the presence of this higher power given to the United States Government by the people of the United States.

That the power of Congress to regulate commerce may be used by it not only for the advancement of commerce but also for the promotion of other objects of national concern, even to the partial or total destruction of commerce itself, as in the days of the Embargo Act, cannot easily be doubted. The power has certainly been so used in the past, although its exercise to this extent, while still constitutional, represents an extreme that could be justified only by the exigencies of a national crisis such as existed in the early days of the Republic.[28]

If Congress does not regulate the movements of foreign and interstate commerce providing laws by which it is to be governed in times

[25] 118 U. S. 455, 465.
[26] Ibid. p. 464, quoted with approval in Gulf, etc. Ry. Co. *v.* Hefley, 158 U. S. 98, 104.
[27] 169 U. S. 613.
[28] United States *v.* Brigantine William, 2 Hall's *Am. Law Journal* 255.

of threatened infection, the states directly affected by the danger will naturally do as they have always done, that is, regulate it rapidly, hurriedly, in their own way, and with a view to their own interests, with the legislative mind more or less affected by the general panic. It is then, when the mischief is done, left to the slow action of the Federal Courts to determine whether the states encroached upon the power of Congress over interstate and foreign commerce or whether they kept within the scope of that local power that is admitted to be theirs. The degree of legislative or political discretion resting with the state legislatures will then, it is to be feared, be determined by the narrower rules of legal discretion, and conflicts will arise that would not have appeared had Congress itself acted in time. *Discretio est discernere, per legem, quid sit justum,* says Coke; and legal discretion is thus at once shown to be limited indeed when compared with that legislative and political discretion that Congress is called upon to exercise and which "embraces, combines and considers all circumstances, events, objects, foreign or domestic, that can affect the national interests * * * surveying the vast concerns committed to its trust."[29].

This leads to the most important aspect of the question and to what seems a conclusive argument in favor of Congressional action. Whether the regulation of quarantine within the scope of the interstate commerce clause is a national question is really not a question for the courts at all, but one to be determined by Congress in the fair exercise of the legislative and political discretion entrusted to it by the people of the United States under the law of the land. In this respect we cannot do better than give the *ipsissima verba* of Prof. James Bradley Thayer, a great and sound teacher of the law, whose departure has been a loss to the country not to be forgotten for decades yet to come. Lengthy as the quotation may seem, it is wholly pertinent; and we are happy to think that, in this way, "though dead, he yet speaketh" to a living issue of the present day. "Now the question," he says, "whether or not a given subject admits of only one uniform system or plan of regulation is primarily a legislative question, not a judicial one. For it involves a consideration of what on practical grounds, is expedient, possible, or desirable; and whether, being so at one time or place, it is so at another: as in the case of quarantine and pilotage laws, and laws regulating the bringing in and sale of particular articles, such as intoxicating liquors or opium * * * * * It is not in the language itself of the clause of the Constitution now in question [the commerce clause], or in any necessary construction of it, that any requirement of uniformity is

[29] See the same case.

found in any case whatever. That can only be declared necessary, in any given case, as being the determination of some one's practical judgment. The question, then, appears to be a legislative one; it is for Congress and not for the courts—except, indeed, in the sense that the courts may control a legislative decision, so far as to keep it within the bounds of reason, of rational opinion. If this be so, then no judicial determination of the question can stand against a reasonable enactment of Congress to the contrary; such for example, as was made in the 'Wilson Bill,' by which a determination of the Court in *Leisy* v. *Hardin* was superseded. * * * * * It would seem to follow that the courts should abstain from interference, except in cases so clear that the legislature cannot legislatively supersede its determinations; for the fact that the legislature may do this, in any given case, shows plainly that the question is legislative and not judicial."[30].

It is indeed not well for Congress to wait with the passage of a national quarantine law until anarchy again, as it did last summer, threatens the commercial relations of the states. Let Congress pass a conservative but effective law embracing in its beneficent operation our entire national boundary line, and land frontier as well as coast. We are, all of us, deeply concerned in the integrity and maintenance of this line as a barrier impassable to every foe of national life.

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[30] 2 Thayer's Cas. on Constitutional Law, note on p. 2190.